84003-2

Court of Appeals No. 26996-5-III

No. 84003-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO PEREZ-VALDEZ,

Defendant/Petitioner.

PETITION FOR REVIEW

RESPONDENT'S ANSWER BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the trial court abuse its discretion in excluding evidence of the unrelated, irrelevant, and unduly prejudicial bad acts of the child victims of sexual abuse?
2. Did the trial court abuse its discretion in excluding evidence of the Defendant's moral character from closing argument where the objection was timely made before closing argument and where no true reputation evidence was offered?
3. Did the trial court abuse its discretion in denying the Defendant's motion for mistrial, where the challenged testimony was elicited by the Defendant, objected to by the Defendant, and promptly stricken from the record?

IV. STATEMENT OF THE CASE

The Petitioner/Defendant Alberto Perez-Valdez was convicted by jury of rape of a child in the second degree and rape of a child in the third degree. CP 29, 75.

The victims S.V. and A.V. were under the foster care of the Defendant and his wife for several years. RP 47-49. Both girls testified that the Defendant had sexual intercourse with them innumerable times over several years. RP 49-95.

The Defendant argued that the children fabricated these accusations in order to be removed from his care. RP 60-78, 88-99, 396-400, 408-20. Although A.V. was a minor, the court permitted significant testimony regarding her poor reputation for truthfulness. RP 88-91, 225-30, 339-42. The court permitted testimony regarding the girls' earlier denials that the Defendant had sexually abused them and regarding the fact that they were aware that their younger sister was removed from the Defendant's care after accusing him of sexual abuse. RP 63-64, 91-93, 99, 229.

The Defendant wanted to present evidence that a very young A.V. had set fire to the foster home of Ginger Burnette where the environment had been strict. RP 104-08. But Ms. Burnette testified that A.V. did not want to leave her home. RP 185, 190. She denied that the girls had taken extreme

measures to get out of her home. RP 192. A.V. herself had said that she started the fire for a different purpose -- in order to get her sister to clean the car, not to get removed from the foster home. RP 109. The judge excluded any evidence of arson, explaining that:

> Number one, you haven't really shown that she just hated this house. ... The link just isn't there. And it is just so prejudicial. And it's prejudicial to the fact-finding process, not just to her. You put in there that she is an arsonist. That's, it's just unfair.

RP 108.

> If she wanted to get out of the house she could make up a lie. That doesn't take a genius to figure out. You can make the argument, but we're not going into the arson, and I'm not taking any more argument on it.

RP 110-11.

> If that were a material fact I would do that in a heartbeat, but this is a collateral matter. I have been thinking about this. My ruling is that's a collateral issue. Maybe she is wrong. Maybe starting a fire is a serious thing. Maybe her interpretation, her opinion is bad judgment. But so what? This case isn't about whether starting a fire is serious or not. It has nothing to do with it. It's a collateral issue.
>
> I will let you do this: I will let you make inquiry did something severe enough happen that the children were removed and leave it at that. So that they at least know something did happen that they were removed, and so something happened.

RP 194.

The Defendant challenged the CPS investigator Karen Patton's

testimony that the children "are telling me the truth." RP 301-02. This response came at defense counsel invitation, "Assuming they are telling the truth?" RP 301-02. The trial court asked the jury to disregard the witness' comment, but denied a defense motion for mistrial. RP 302, 441-45.

The Defendant presented several witnesses who testified that they worked with him and had not witnessed any inappropriate interaction between him and his daughters. RP 203-04, 207-08, 262-67. The girls had testified that the abuse occurred in the Defendant's bedroom. RP 301-02. The trial court considered issuing a jury instruction striking this evidence pursuant to *State v. Griswold*, but decided to merely prohibit defense counsel from arguing this evidence in closing argument. RP 333-36. Counsel made no objection. RP 367.

V. ARGUMENT

The arguments made in the Brief of Respondent to the Court of Appeals are maintained herein.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF UNRELATED BAD ACTS OF THE CHILD VICTIM.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245

(1995). Where the decision of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing that the court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999); *State v. ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The court's decision to exclude evidence that the A.V. started a fire at a previous foster home is tenable under ER 402. It is simply not relevant. The evidence did not establish, as the Defendant attempted to argue, that A.V. started a fire for the purpose of moving to another foster home. The trial judge found that the matter was not material, but collateral. RP 194. There was no logical connection between the arson and the sexual abuse accusation. RP 109-110.

The decision is also tenable under ER 403. Because the matter was irrelevant and unrelated to the issues in the trial, its admission would have been confusing to the jury and a waste of time.

The decision is also tenable under ER 404(b). A party may not introduce the bad acts of another merely to prove character and action in conformity therewith.

The Defendant argues that the evidence would have shown that the

children had a motive to falsely accuse him – namely to get out of a living situation they did not like. Petition for Review at 11. This is not the evidence. There was no evidence that the fire was started for the purpose of getting out of living with Ms. Burnette or that they did not like living with her. The Defendant argues that Ms. Burnette's evidence that the children liked living with her would have been refuted by the arson. Petition for Review at 12-13. The truth is the Defendant had no evidence to show what A.V's intent in starting a fire was to move to a different foster home.

The Defendant relies on *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006), *rev. denied* 159 Wn.2d 1010, 154 P.3d 918, *cert. denied* 552 U.S. 841, 128 S. Ct. 83, 169 L.Ed.2d 64 (2007). That case's discussion of ER 404(b) is from the unpublished portion of the text. *State v. Monschke*, 133 Wn. App. at 338. Such reliance is a violation of court rule and not permitted. GR 14.1(a); *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING CHARACTER EVIDENCE IN CLOSING ARGUMENT.

As stated above in § A, the trial court's evidentiary decisions are reviewed for discretion that is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Pirtle*, 127 Wn.2d at 648; *State v. Wade*, 138 Wn.2d at 464; *State v. ex rel Carroll v. Junker*, 79

Wn.2d at 26.

The Defendant does not argue that the character evidence was admissible. It plainly is not. Character evidence is generally not admissible in order to show action in conformity with character. ER 404(a). And reputation evidence is only admissible in certain circumstances. ER 405. In a sexual assault case, reputation for sexual morality is only admissible if relevant and if a proper offer of proof is made. *State v. Griswold*, 98 Wn. App. 817, 829-30, 991 P.2d 657 (2000), *abrogated on other grounds by State v. DeVicentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). The court found inadequate foundation under this test. The testimony offered was not reputation evidence.

Moreover, the particular evidence was not relevant. ER 402. That the Defendant's co-workers did not witness the acts he committed in the privacy of his own bedroom is not probative of anything.

Instead, the Defendant argues that because he got away with it once without any objection from the prosecutor, he should have been allowed to repeat this information again, in closing argument, over the prosecutor's timely objection. Petition for Review at 9. He cites *State v. Gray*, 134 Wn.

App. 547, 138 P.3d 1123 (2006) in support. In that case, the Defendant failed to make any objection to the admission of certified copies of his prior convictions ***until appeal***. *State v. Gray*, 134 Wn. App. at 549-50, 557. Those are not the facts here.

In the instant case, the Defendant violated CrR 4.7(b)(1) by failing to inform the prosecutor what the substance of his witnesses' testimony would be. RP 329-31. If he had complied with the rules of discovery, the prosecutor could have made a motion in limine to exclude the witnesses entirely. Instead, the State asked that the testimony be stricken after it had been uttered. RP 333.

The trial court, in discussion with the parties, did not strike the testimony and did not instruct the jury to disregard the testimony. RP 367. But, observing that the general moral character testimony should have been excluded under *State v. Griswold*, the court prohibited the Defendant from repeating the mistake in closing argument. RP 367. Defense counsel did not object to this ruling. RP 367.

The negotiation that produced this result was an agreement of the parties. It is binding and not appealable. *Nguyen v. Sacred Heart Medical*

Center, 97 Wn. App. 728, 735, 987 P.2d 634 (1999); *Snyder v. Tompkins*, 20 Wn.App. 167, 173, 579 P.2d 994, *review denied* 91 Wn.2d 1001 (1978).

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION FOR MISTRIAL.

The granting or denying of a motion for mistrial is within the sound discretion of the trial court, and the ruling will not be disturbed unless a clear abuse of discretion is shown. *In re Det. of Broten*, 130 Wn. App. 326, 336, 122 P.3d 942 (2005). A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *Broten*, 130 Wn. App. at 336.

The testimony, to which the Defendant objected, was (1) elicited by the Defendant and (2) stricken by the court. The Defendant asked Ms. Patton if she assumed the children were telling her the truth, and she answered succinctly that they were telling the truth. RP 301-02. Defense counsel immediately objected and made both a motion to strike and a motion for mistrial – in the presence of the jury. RP 301-02. The court struck the offending testimony, but denied the motion for mistrial.

In later discussion, the court told the defense counsel that he was to blame for eliciting the testimony. RP 442.

> [On direct examination, she] never said anything about what she believed or didn't believe. But on cross-examination, you

> said, "Assuming they're telling you the truth." ... She said, yeah, they are telling me the truth. You asked the question and she responds. She responds, and now you want a new trial.

RP 442. A party who sets up error may not complain of it on appeal. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984) *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d (1995). If the challenged testimony is specifically elicited by defense counsel, it is invited error and not reviewable on appeal. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006); *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (the invited error doctrine is a "strict rule" intended to apply to every situation where the defendant's actions were at least in part the cause of the error).

The judge noted that the single comment had been immediately stricken, the jury so instructed, and, therefore, could not require a new trial.

> I sat through this trial. And when I look at the circumstances of this case, the factors that you've cited, the type of witness, nature of the testimony, nature of the charges and the type of offense, this was one of many witnesses. There were numerous experts that testified. There was one question and one answer; assuming you believe her. I do believe her. That was it. Out of a several day trial. And there is no way, in my opinion, that that tainted this whole trial. And I told them to disregard it. And they're presumed to do what I tell them to do.
>
> You know, I was struck, there was a quote in one of our most recent advance sheets, Justice Sweeney of the Court of Appeals said this, I forget what the issue was, some question about what had happened. He said this: "Certainly,

> the perfect case was not tried here. But the perfect case has not been and never will be tried. The parties here are not entitled to a perfect trial. They're entitled to a fair trial."
>
> That's exactly what they got. They got a fair trial here. He had his day in court. One comment by one person, one fleeting reference, that I think was at least partially invited, certainly didn't turn this thing around. So at a minimum, it would have been harmless error, beyond a reasonable doubt.

RP 445-46. The court's balancing is the proper standard.

For such a challenge to reviewable, there must be a timely objection. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). With a timely objection, the trial court then has an opportunity to remedy the situation. That is what happened here. The court immediately sustained the objection and struck the testimony. As the court said, jurors are presumed to follow instructions. *State v. Brown*, 132 Wn.2d 529, 618, 940 P.2d 546 (1997); *State v. Sanders*, 66 Wn. App. 380, 390-91, 832 P.2d 1326 (1992). Any error was remedied. Reversal is not required where the error could not have materially affected the outcome of the trial within reasonable probabilities. *State v. Korum*, 157 Wn.2d 646-47. The court did not abuse its discretion in denying the motion for mistrial under these circumstances.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the Petition for Review.

DATED: January 11, 2010.

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